LIBRARY
SUPREME COURT, U. S.

71-1108

Supreme Court, U. S.
FILED
NOV 1977
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
MAR 25 1972
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1971

71-1108

No. A-506

GEORGE NEWSOME and DOYAL CRISWELL,
Petitioners,

v.

MASON & HANGER-SILAS MASON CO., INC., THE RUST ENGINEERING COMPANY, a Joint Venture, d/b/a MASON-RUST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

V. LEE McMAHON
THOMAS M. HANNA
1153 Pierre Laclede Building
7701 Forsyth Boulevard
St. Louis, Missouri 63105
Attorneys for Respondents

Of Counsel
McMAHON & BERGER

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Denying the Writ	5
Conclusion	8
Appendix "A"—28 USC, § 1254(1)	A-1

Table of Cases Cited

Emporium, The, 192 NLRB No. 19, 77 LRRM 1669 (1971)	6
NLRB v. Allis-Chalmers Manufacturing Co., 388 US 175 (1967)	7
NLRB v. Burnup and Sims, Inc., 379 US 21	8
NLRB v. Tanner Motor Livery, 419 F.2d 216 (CA 9 1969)	6, 7
Scofield v. NLRB, 394 US 423 (1969)	7
Solien v. Drivers et al., Local No. 610, 440 F.2d 124 (CA 8 1971)	5
UAW Local 283 v. Scofield, 382 US 205	5

Miscellaneous Cited

28 USC 1254(1)	1, 2, 5
29 USC 151 et seq.	2
29 USC, § 160(e)	5
Rule 15(d) FRAP	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-806

GEORGE NEWSOME and DOYAL CRISWELL,
Petitioners,

v.

MASON & HANGER-SILAS MASON CO., INC., THE RUST ENGINEERING COMPANY, a Joint Venture, d b a MASON-RUST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A7) is reported at 449 F.2d 425. The Board's decision and order (Petition A9-A15) are reported at 179 NLRB 434.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1971. This Court does not have jurisdiction of this action under 28 USC 1254(1) as only a party to an action before the United States Court of Appeals may be granted certiorari and the Petitioners herein are not, and have never been, a party to this action.

QUESTIONS PRESENTED

1. Whether or not the Petitioners are now entitled to intervene in a matter which was argued and submitted before the Court of Appeals by the original parties, and said Court decided the case, all before Petitioners attempted intervention?

2. Whether or not the findings of the National Labor Relations Board that Newsome and Criswell were unlawfully refused preferential hiring are supported by substantial record evidence?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, as amended, 73 Stat. 519, 29 USC 151 et seq.) are set forth at pages A18-A22 of the petition; the relevant provisions of the Federal Rules of Appellate Procedure for United States Court of Appeals are set forth at pages A16-A18 of the petition; and some of the relevant provisions of the Rules of the Supreme Court of the United States are set forth on page A18 of the petition. 28 USC 1254(1) is set out in Appendix "A", *infra*.

STATEMENT

Respondents were a joint venture engaged in the process of converting an abandoned foundry into a plant for the manufacture of artillery shells pursuant to a contract with the Corps of Engineers of the United States Army (JA 4-5).[1]

The hiring of employees was done by the foreman of each of the several crafts working on the project. The carpenter foreman, as other craft foremen, was designated by the Carpenters' Union. The Carpenters' Union had a collective bargaining agreement with Respondents covering the carpenter unit (JA 251).

---

[1] "JA" refers to the Joint Appendix filed in the court below.

Newsome, a Petitioner herein, by his own admission quit a steady union job to apply for work at Respondents' job site (JA 257). Newsome's self asserted reason for quitting his employment was to "get on the gravy train." Newsome applied for work by telephoning the personnel manager who told him that hiring was done by the carpenter foreman at the job site, and the latter arranged for Newsome to meet the foreman on the following day (JA 85). Newsome missed that appointment (JA 85). The day following, Newsome appeared in the personnel manager's office accompanied by Criswell (JA 86). Newsome introduced Criswell as a journeyman carpenter but Criswell never took the stand to establish his qualifications. Newsome became belligerent and demanded that he be hired and the personnel manager made an appointment for Newsome and Criswell to meet the carpenter foreman the following morning (JA 86-87). Newsome missed the meeting because he was at least twenty-five (25) minutes late for the meeting, and Criswell did not appear (JA 87-88).

A third appointment was made for Newsome which he kept (JA 88). Newsome was told that 150 men were ahead of him on the list and he would have to wait his turn (JA 147 and 167). Newsome left the number of a pay telephone at "Tony's Tavern" with the carpenter foreman for purposes of making future contacts (JA 196-97).

Almost one month later Newsome appeared at the job with one Duffy, whom he represented to be a laborer (JA 256 and 300). The meeting had been arranged after Newsome called corporate headquarters in Pittsburgh (JA 255). Newsome was told that 18 carpenters had just been laid off, but he asserted that he had quit a good job to "get on the gravy train" and demanded that as a Negro he be given preference in hiring. Newsome was advised that the Respondents would consider his claim (JA 257-58).

The next day Newsome telephoned Respondents' project manager and cursed and insulted him at length (JA 262-263). The project manager contacted the Union and found that Negro carpenters could be located and he instructed the Union that Negroes were to be hired for the next available jobs (JA 259-61). Newsome was not removed from the foreman's list, nor did he receive preferential treatment in hiring as the Respondents considered him to be emotionally unstable (JA 86-87 and 262-63). The carpenter foreman subsequently attempted to hire Newsome when his name came up on the list but Newsome could not be reached (JA 210-211).

The National Labor Relations Board found the Respondents had failed to carry the burden of proving that they did not discriminate against Newsome and Criswell by the failure to hire them before hiring two other Negroes as it presented no "credible" explanation or excuse (JA 29). The Board made no attempt to prove that Newsome was not called when his turn came. The United States Court of Appeals for the Eighth Circuit recognized the Respondents had asserted Newsome's failure to keep appointments and his abusive manner as a reason for not granting him preference, and the Court held that it was the Board which failed to sustain the burden of proof. As for Criswell the Court found there was "little or no evidence" of a refusal to hire because of his "concerted activities" (Pet. App. A-6).

The Board filed its application for enforcement on May 8, 1970, and subsequent thereto an answer, joint appendix, and briefs were filed. The cause was argued on December 15, 1970, and judgment rendered on October 12, 1971. Petitioners moved to intervene at the Court of Appeals level on January 12, 1972, and the motion was denied January 31, 1972.

REASONS FOR DENYING THE WRIT

I. Petitioners Have No Right to a Writ of Certiorari as They Chose Not to Participate in This Case Until Such Time as It Was Resolved Against Them.

Respondents contend that the Petitioners have no right to seek certiorari, nor does this honorable Court have the right to grant certiorari as 28 USC, Sec. 1254(1) authorizes a writ only upon the petition of a party to the action and Petitioners are not a party in this case. Petitioners did not participate at the Court of Appeals level because they failed to intervene in a timely fashion. Moreover, 29 USC, Sec. 160(e), relied upon by Petitioners, confers no jurisdiction independent of the aforecited 28 USC, Sec. 1254(1) and may not be relied upon to support the Petitioners' prayer.

Petitioners contend that it is their absolute and unrestricted right to intervene in this action, relying upon **Solien v. Drivers et al., Local No. 610**, 440 F.2d 124 (CA 8, 1971); and **UAW Local 283 v. Scofield**, 282 U.S. 205. Respondent would not deny Petitioners the right of intervention so long as the same was timely in nature. The cases relied upon by Petitioners do not establish any right to intervene **after** judgment or otherwise excuse them from the obligation to comply with Rule 15(d) FRAP, which requires that the motion to intervene be filed within thirty (30) days of the filing of the petition for review. The petition for enforcement was filed on May 8, 1970, the case argued on December 15, 1970, and judgment rendered on October 12, 1971; all before the motion to intervene was filed. The fact that the **Scofield** case was grounded upon a policy of avoiding multiple appeals underscores the need to here deny the petition for the same reason. To grant the writ would encourage every charging party to await

the outcome of every court decision, and the Board determination to seek certiorari, and only then participate in the case and thus secure a "second bite at the apple." Indeed, had Petitioners chosen to participate in the action below, the Court of Appeals might well have put a great many awkward questions to their counsel. Therefore, the writ should be denied for the reason that this honorable Court now has no jurisdiction over the case because of Petitioners' failure to intervene and become a "party."

II. The Counsel for the General Counsel of the National Labor Relations Board Failed to Prove That Any Unlawful Act of Discrimination Occurred With Respect to Newsome and Criswell.

Respondents contend that Petitioners were not engaged in concerted protected activity, nor were they the objects of unlawful discrimination.

The acts of Newsome (for those of Criswell have never been established beyond the most passive of roles), at best, show that he was a "self-appointed" guardian of his fellow black carpenters. This position was usurped at the expense of the Carpenters' Union which was the **exclusive** collective bargaining representative of the Carpenter employees of Respondents. It is now the position of the Board[2] that employees who are represented by a union, and who engage in misconduct when purporting to represent a segment of the bargaining unit, lose the protection of the Act because to hold otherwise would undermine the entire scheme of collective bargaining to the prejudice of both employees and employers. **The Emporium**, 192 NLRB No. 19, 77 LRRM 1669 (1971). This line of reasoning fol-

[2] As contrasted with the Board's position at the time it decided this case. See **NLRB** v. **Tanner Motor Livery**, 419 F.2d 216 (CA 9, 1969).

lows that of the United States Court of Appeals for the Ninth Circuit in the **Tanner** case, *supra*, which denied enforcement of a Board Order for the reinstatement of two employees discharged for picketing to protest the employer's failure to hire Negroes.

In **Tanner**, the Ninth Circuit relied upon this Court's decisions in **NLRB v. Allis-Chalmers Manufacturing Co.**, 388 U.S. 175 (1967), and **Scofield v. NLRB**, 394 U.S. 423 (1969), in which a union's right to impose the will of the majority, upon **all** members was affirmed, and held that the union had not sanctioned the acts of the discharged employees, those acts were contrary to the established contract between the company and the union, and therefore, the picketing was unprotected. Here Newsome may have threatened to picket (accompanied by his family—not by Criswell) but such picket had not been sanctioned by the union, it was in breach of contract, and it was a threat made in an attempt to contravene the company-union established hiring procedure. Therefore, under existing Board law, and in the opinion of the only Court of Appeals to have expressed itself on this matter, Newsome and Criswell were not engaged in protected concerted activity.

Even if the law were otherwise, Newsome and Criswell were not shown to be the objects of discrimination in hiring. To be certain, other Negroes were preferred to Newsome but that was because of his obnoxious, irrational, and belligerant behavior rather than the color of his skin or the alleged object of his protestations. Moreover, it would hardly seem to meet the concept of discrimination to assert that Respondents had the obligation to single out and **prefer** Newsome to other carpenters.

The Board failed to dispute the Respondents' proof that Newsome was called in his turn, but could not be reached; nor did it dispute Respondents' proof that others were

ahead of Newsome and Criswell. Newsome **only** asserted that **he** was not hired. It should not be surprising that Newsome did not respond to the call to work as the only number he left was that of a pay telephone in "Tony's Tavern".

The Board did not call Criswell to the stand to establish that he and Newsome were acting in concert to secure the hiring of themselves or of Negroes generally.

The Board did not establish that Criswell had the qualifications of a journeyman carpenter. Nor did Criswell so assert to the Respondents at any time. The Board did not even prove that Criswell was ready, willing and able to go to work!

Finally, the Board failed to prove that Respondents were aware of the alleged concerted protected activity of Newsome and Criswell notwithstanding this Court's clear pronouncement:

> "In sum, §8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such . . ."[3]

Thus, all that Respondents could possibly know was that Newsome, and on one occasion Criswell, had applied for work. Criswell was not the least offensive or threatening and soon he was completely obscured from Respondents.

CONCLUSION

Petitioners pray for a writ and ultimate reversal of the Appeals Court decision to encourage black efforts to integrate the construction trade work forces. While the ultimate goal is most worthy, it cannot be advanced at the

---

[3] **NLRB v. Burnup and Sims, Inc.**, 379 U.S. 21 at page 28.

expense of an innocent party, nor should it be a windfall for a wholly undeserving individual who is attempting to ride a "gravy train" merely because he is "black". At a time when the power and majesty of the federal government and the several states are faltering in their attempts to end the most patent forms of discrimination in the building trades, no justice will be done by pursuing an employer who has done his best to comply with the law of the land and his defense agency contracts, and who has done nothing to discriminate against any man.

Respectfully submitted :

V. LEE McMAHON

THOMAS M. HANNA
Attorneys for Respondents

Of Counsel

McMAHON & BERGER

APPENDIX "A"

28 U.S.C.

§1254(1) COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"